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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 384

HOWARD MOORE, PETITIONER,

vs.

THE CITY OF NAMPA, A MUNICIPAL CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Statement of the Case.

This action arises out of a decision of the Supreme Court of the State of Idaho in the case of Lucas vs. the City of Nampa 238 Pac. 288. After that case was decided this action was brought for the purpose of recovering against the city generally, upon the theory that the officials of said city had been negligent in their failure to provide lawful assessments, from which the principal and interest of plaintiff's bonds could be paid. The bonds affected by the Lucas case were those in excess of the original estimate of $118,300.00. A portion of the excess was necessary in order to pay a commission for the sale of the bonds and compensation to an engineer other than the City

engineer for the construction of the improvement. As to those items the decision of the Lucas case was to the effect that they were illegal and beyond the power of the city.

The city having no power to issue the bonds for the payment of these items the question is squarely presented whether or not the city can be held liable for the failure to do that which it had no power or lawful right to do. If without such power it was beyond the jurisdiction of the city and the question could be raised at any time.

Summary of Argument.

I

The decision of the Circuit Court of Appeals, is in conformity with the decisions of this and other circuits based upon similar conditions.

II

The Idaho Statutes and decisions of the Supreme Court do not grant the power to a City to bind itself generally for local improvements.

III

Respondents officers were not empowered to do more than represent the local district.

IV

Petitioners cause of action is barred under the Statutes of Idaho.

Argument.

Petitioner insists that the decision of the Circuit Court

of Appeals is in conflict with the decisions of this Court and the decisions in other circuits. We may assume from this statement and from the authorities he cites that he refers to the decisions in the case of Hitchcock vs. Galveston. 96 U. S. 341. District of Columbia vs. Lyons 161 U. S. 200, Barber Asphalt Paving Company vs. The City of Harrisburg, 64 Fed. 283, Barber Asphalt Paving Co. vs. City of Denver 72 Fed. 336, City of Mankato vs. Barber Asphalt Paving Company, 141 Fed. 349, Bates County, Missouri vs. Wills 239 Fed. 785, and Oklahoma City vs. Orthwein 258 Fed. 190.

We believe that each of the above cases may be readily distinguished from the case at bar and in so doing may be clearly shown as not conflicting with any decisions of this Court or any decisions of the other Circuit Courts. The trial court in its opinion (R Page 46) said in dealing with this particular phase of the question,

> "As construed in his written briefs, plaintiff's complaint alleges that his bonds are invalid and accordingly he argues that his only remedy is for a tort. Obviously, therefore, cases ex contractu are not in point. Nor can we regard as precedents tort cases where the plaintiff had valid bonds or other form of contract containing provisions, as here, for payment out of a special fund and the defendant having a duty to provide such fund wilfully or negligently defaulted in the discharge of such duty."

This statement clearly applies to the case in question cited by petitioner as authority for his position. The case of Barber Asphalt Paving Company vs Harrisburg, supra was decided on the theory that:

"At the date of the contract the defendant had the authority to pave its streets and pay for the same out of the treasury."

It preferred however to contract against this liability and attempted to do so by requiring that the improvements be paid for by special assessments, and having failed however to make valid assessments the court held the municipality liable on the ground and for the reason, that it had the right and power to make this contract and pay for the improvements out of its treasury irrespective of the special assessments. In the case at bar no such authority exists.

The same distinction may be made in the case of Barber Asphalt Paving Company vs. City of Denver Supra, since there the municipality had the power to make the contract it did make for the improvement, and to avoid liability, it merely stipulated against payment from the general treasury. In the case at bar the respondent was absolutely devoid of power to issue the bonds for the purpose for which they were issued.

In the case of City of Mankato vs. Barber Asphalt Paving Company, supra the Court said:

> "It is not contended that there was any want of power in the city to make the contract, all pre-requisite steps were taken to that end. The only questions are whether there were such irregularities in the exercise of the power as to avoid the contract. The suit against the city is for damages for failure to discharge this statutory duty."

In the case at bar, however, it is contended that there was an absolute and total lack of power on the part of the respondent to do that which it attempted to do and there can be no liability for a failure to do that which cannot be

legally done (Carpenter vs. City of Cohoes 81 N. Y. 21).

The case of Orthwein vs. Oklahoma City, Supra, is also clearly based upon the theory of a breach of contract which the municipality had the power to make and in which it stipulated against liability generally. In the case at bar, by the rule laid down in the Lucas case the respondent never possessed any power whatsoever to enter into a contract providing for a commission for the sale of the bonds and the employment of an engineer other than the regular city engineer. Irrespective of the fact that the original estimate included or did not include these charges since they were specifically declared illegal, bonds issued covering the same are void having been issued for an illegal purpose and without the authority or power of the municipality to issue the same.

In the case of District of Columbia vs. Lyons 161 U. S. 200 the work was done pursuant to a valid contract and the district received the benefit therefor, but the corporation and its successor, the District, failed to make the required assessments for the payment of the certificates involved, and it was held that the district was liable generally for its negligence in failing to make the proper levy within the prescribed time.

In the case of Bates County Misouri vs. Wills, supra, so strongly relied on by petitioner, it was held that the county was not prohibited from making the necessary assessments and the court said, beginning at page 789;

> "Because the county is not prohibited from making, but is in our opinion empowered by the statutes of Missouri to make, the assessments necessary to pay for the ditch whether the funds derived from the sale of the issue of bonds have been exhausted or not—

"Because if a municipal or quasi municipal corporation which has the power to make a contract for internal improvements contracts for them and stipulates that the agreed price of the improvements shall be paid to the contractor out of funds to be realized out of special assessments, or, out of the proceeds of bonds it has the power to issue, and the corporation has power to make the assessments or to issue the necessary bonds but fails to make sufficient valid assessments, or to issue sufficient bonds to provide the necessary funds to pay the contractor the contract price of his material and labor, or if it misappropriates such funds to other purposes, the corporation becomes primarily liable to pay the contract price itself. * * * * * * *

"And if a municipal or quasi municipal corporation which has the power to make a contract for internal improvements contracts for them and stipulates that the agreed price thereof shall be paid to the contractor without any specification of the source from which it will derive its fund to do so, and there is no statutory prohibition of a general levy upon the property within its borders, the legal inference is that the grant of the power to make the contract also granted to it the power to levy, collect and pay over to the contractor the funds necessary to pay the agreed price of the labor and material the contractor furnished."

The case last quoted from is practically a resume of all the authorities cited and quoted by the petitioner upon the right to hold the respondent liable for negligence, and it must be noted that the basis for the decisions in all of the cases is, that the municipality had the general power to bind itself for the payment of the construction of improvements in which such municipality had been held liable for negligence. In other words, all the cases and the decisions

of the courts have been to the effect that where the municipal corporation has the power to construct the improvements and levy a general tax for the payment of the same but contracts and stipulates against such general liability, on the theory that the property benefited alone, should be held for the payment of such improvements by a special tax to be assessed against the same and then fails to levy such tax, or for some reason such tax becomes invalid then the municipal corporation is held generally liable for negligence. We respectfully beg to disagree with counsel for petitioner in his endeavor to show that the statutes of Idaho authorize or empower the respondent to bind itself for the payment of a sewer improvement such as involved in this case. From Section 4132 cited and quoted on page 64 of petitioner's brief it appears that the city council or trustees may expend from the general fund what in their judgment may be fair and equitable to be paid by the general public in consideration of the benefits accruing to such general public by reason of the construction of the sewerage improvements. It will be readily seen that this section of the Idaho Compiled Statutes does not give to the council general power to construct a sewerage improvement at the cost and expense of the public generally. It is in fact a restriction and limitation upon the part of the council in paying out of the general fund more than which it can be reasonably said the general public is benefited.

We desire to point out that nowhere in the record is it claimed or alleged that the council has not fully and completely performed the governmental function of determining to what extent the general public has been benefited or that the amount so found has not been paid.

Section 3942 of the Idaho Compiled Statutes is also

cited in the appendix of the Petitioner's brief, apparently upon the assumption that such section grants to the municipality power to construct sewers and to defray the cost and expense of the same out of the general fund. But an examination of that statute discloses the fact that it is an enumeration of one of the general legislative powers of a municipality, and has to do only with the improvements of the streets generally, and refers to sewers constructed upon such streets and has nothing whatsoever to do with the construction of general sewerage improvement such as is involved here, and therefore this section of the statutes is not material in determining the matter before the court.

We have not attempted to go into the facts of all of the cases cited and quoted from by counsel for petitioner and to do so would unduly prolong the discussion upon this point. Suffice it to say, that all of the cases cited and quoted hold to the theory that where a municipality has power to bind itself generally for the construction of improvements but stipulates and contracts that it shall not be held liable generally, but that the contractor shall look wholly to the property benefited for his compensation for the improvements constructed by him, out of assessments to be levied against such property, and then fails and neglects to make such assessments the municipality may be held generally liable for its failure to do that which it had the power to do, and if it did not have the power to make such assessments but could make the improvements at the expense of the City the rule is that the municipality may then be held generally.

In the case of Lucas vs. the City of Nampa 238 Pac. 288, it was expressly held that the city did not have power to exceed the original estimate; that it was illegal and

void to include within any estimate compensation for the payment of any engineer other than the city engineer; that it was beyond the power of the City and that its attempt to pay a commission for the sale of the bonds, was illegal and void. We maintain that even though the city had included in its original estimate an amount sufficient to pay such items that never the less, any taxpayer could have questioned the right and power of the city so to do and when presented it would have been the duty of the court to hold that the attempt to pay such items was void. The defect of power was jurisdictional.

Lucas *vs.* City of Nampa, Supra.

The Respondent was not Acting in a Corporate Capacity.

It is contended that respondent's officers were performing corporate functions in connection with the improvements specified and that the city is generally liable for the failure of its officers to have an estimate filed which would cover the total cost and expense of the amount necessary to meet the full cost and expense of the improvements in Sewer District No. 22 including the cost and expense of an engineer's services, other than that of the city engineer, and, also the cost and expense of disposing of the bonds of the district in an amount sufficient to recompense the district in the sale of the bonds at less than par. In other words it is contended that if the city and its officers had adopted another procedure than that which it did, it would have been possible for the city to have paid not only an engineer's expenses based on 5% of the total cost of expense and improvement, but also a commission to be paid for the sale of the bonds in question.

We maintain that the officers of the city in performing the functions referred to them were performing functions of a special and limited jurisdiction and that under the statutes of Idaho the mayor and council were the mere agents of the district created under authority of law for the organization of the improvement District to carry out the purport of the statutes relative to the improvement contemplated. That in no wise did the mayor and council purport to act for the city or do anything that they had lawful power to do to in any manner bind the city as a whole. This distinction while it may at first blush seem to be close and more or less technical, yet there is that broad distinction, that regardless of the fact that in ordinary instances they represent the municipality generally, nevertheless in the construction of the improvements involved in this action they represent only the property included within the District.

In the case of Broad vs. Moscow 15 Ida. 606 99 Pac. 101 the question as to the authority and functions of the mayor and council in the construction of a sewer improvement was squarely before the court and the court said at page 624:

> "From the various provisions in this statute it would seem that the legislature intended to make the city a mere instrumentality for the collection and disbursement of the funds arising from the special assessments. Throughout the statute it clearly indicates that it was intended to create an indebtedness against the property alone and to limit all liens and claims to the property benefited by such improvement. The city or village is made the agent of the district to collect and apply the funds assessed to the discharge of the expense incurred in making such

improvement. The obligation is an obligation of property not an obligation of the city or municipality. The contractor and bondholder is limited to the property for the purpose of realizing the amount due such contractor and bondholder. The duties of the city in relation to the improvement and the fund to be collected from the property and the duty of the officers of such city clearly appears from the provisions of the act and if the city or the officers of the city, whose duty it is to act, neglect or fail to perform the duties imposed by this law then the remedy of the contractor or bondholder is against such officers for the purpose of compelling them to act, but the indebtedness cannot be taken away from the property benefited and fixed against the property generally of the city. If a general judgment could be obtained against the city then to the extent of such judgment there would be an increased debt above the expense of the improvement which the property must pay.

We think it clearly appears from the entire act that the legislature intended to inhibit the creation of any municipal indebtedness and to limit all claims for such improvements to the property affected.

It will be seen that the power and authority of the mayor and council to represent the property included within a sewerage improvement district has been determined by the Supreme Court of the State and limited to a particular and specific purpose, and the fact that the original statute vested this power and authority in a sewer committee can in no way change the power and authority of the mayor and council, when as a matter of law the powers vested in a sewer committee have been merely transferred to and vested in the mayor and council instead of such sewer committee. This matter having been squarely presented to the

Supreme Court of the State of Idaho and it having passed upon the question its decision on the point raised becomes binding on all courts.

6 Ruling Case Law, Constitutional Law Sec. 84.

The question decided by the circuit court is neither new nor novel for in following the decision of the Supreme Court of Idaho it was not without precedent and the case of Quill vs. Indianapolis 14 Ind. 292. 23 N. E. 788 & L. R. A. 681, not only bears out the theory of the law involved, but is based upon common-sense and reason. Since the decision in the case of Broad vs. Moscow the question of the power and authority of the mayor and council to represent the city generally has been presented to the Supreme Court of the State of Montana in the case of Gagnon vs. the City of Butte, 75 Montana 279, 243 Pac. 1085 and the court there had occasion to review this question and refer to the case of Broad vs. Moscow, 15 Idaho 606 99 Pac. 101. Among other things the court said:

> "Primarily the City of Butte incurred no personal liability to the contractor who did the work. It was merely constituted an instrumentality of the law in initiating and carrying out the improvements and in collecting the money due upon the assessments made by it against the property benefited in order to pay the obligations incurred in the execution of the work. Town of Windfall City vs. First National Bank 87 N. E. 985, 89 N. E. 311. 172 Ind. 679."

See also Peake *vs.* New Orleans 139 U. S. 342.

Lack of Another Remedy and Statute of Limitations

Petitioner attempts to make a point that he has no other

remedy by which he can be compensated for his investment unless the City can be held generally liable.

However, inasmuch, as petitioner has only related his conclusions as to the effect of the Idaho Statutes relative to his rights, which neither bear out nor confirm the conclusions reached, we pass this point without comment, and pass to the point raised relative to the Statute of Limitations.

And we desire to point out that if the petitioner had any cause of action at all it is based upon the theory that the respondent's officers were negligent in failing to levy sufficient valid assessments to meet the bonds in excess of $118,300.00, a portion which are held by petitioner. If the respondent failed or neglected to do anything within its power, such failure or neglect was entirely consummated prior to the delivery of the bonds in question to Sidle, Simons, Fels & Co., on March 8th, 1921.

The present action was commenced in the District Court on February 18th, 1926, nearly five years after the bonds in question were sold and delivered to the purchasers.

Section 6611, Idaho Compiled Statutes provides as follows:

> 'Within three years:
>
> 4. 'An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.'

Section 6617, Idaho Compiled Statutes provides:

> 'Actions for other relief. An action for relief not hereinbefore provided for must be commenced with-

in four years after the cause of action shall have accrued.'

Under either of the foregoing, petitioner's cause of action is barred unless it can be said that the Lucas case had the effect of tolling the statute but the trial Court in passing upon this phase of the case held that it did not, but the Circuit Court deemed it not to be necessary to pass upon the question at all.

The petitioner, however, having referred to it in his brief as of some importance, we take the opportunity and privilege of attempting to distinguish the facts in the present case from those in the cases cited by Counsel, and particularly to the case cited from the State of Idaho, Hillock vs. Idaho Title & Trust Co., 126 Pac. 612., in which it was pleaded that fraud had been practiced on the plaintiff and that such fraud had not, as a matter of fact, been discovered until a point of time within the statute.

The court held that such pleading was sufficient and that it was a question of fact as to whether or not the cause of action was barred.

In the present case there is nothing to show in the pleading that the petitioner did not have full and complete knowledge of the alleged negligence within the period of either or both of the foregoing statutes, and of the very time when such negligence was committed.

And, at best, if it may be said that the petitioner was mistaken at all as to the facts surrounding the execution and delivery of the bonds in question, it could only be a mistake relative to the power of the respondent to make valid assessments against the property within the local improvement district to pay the principal and interest on the bonds in excess of the original estimate.

We maintain, that the Lucas case did not take away from respondent any power that it had originally, and the case only decided points of law which the petitioner and everyone else was presumed to know.

It cannot be maintained that the petitioner did not know what the law was or that his cause of action should be postponed until the Supreme Court of Idaho, should hold as a matter of law, that respondent had exceeded its lawful power.

We therefore, respectfully submit that the Circuit Court of Appeals was correct in its decision; that the respondent is not liable generally for the reasons stated in the opinion of the Court; that any cause of action the petitioner might have had is barred, for the reasons stated by the trial Court (R-58); that the petition for writ of certiorari should be denied.

Respectfully Submitted,

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